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## Maintaining the Privacy of Personal Information: The DPPA And the Right of Privacy

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Maginnis: Maintaining the Privacy of Personal Information: The DPPA And the

# MAINTAINING THE PRIVACY OF PERSONAL INFORMATION: THE DPPA AND THE RIGHT OF PRIVACY

## I. INTRODUCTION

Society is currently struggling with an inevitable side effect of the information age—the erosion of personal privacy. Consequently, people are becoming increasingly protective of their identities and their privacy. A balance must be struck between the free flow of information upon which our growing economy relies and the individual's right to maintain privacy, personal dignity, and anonymity in an ever-encroaching and crowded world.

It is well settled that the United States Constitution recognizes a right to privacy in certain contexts.<sup>1</sup> However, the United States Supreme Court has yet to determine whether this right extends to information already disclosed to the government. Although that issue arose in *Condon v. Reno*,<sup>2</sup> a Fourth Circuit case involving the Driver's Privacy Protection Act of 1994 (DPPA),<sup>3</sup> the United States Supreme Court did not address the issue on appeal in *Reno v. Condon*.<sup>4</sup> Instead the court focused solely on the issue of whether the DPPA violated the federalism principles of the Tenth Amendment.<sup>5</sup> However, the Court in *Reno* did determine that Congress had constitutional authority to enact a law protecting the privacy of personal information collected by the state departments of motor vehicles.<sup>6</sup>

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1. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (recognizing that individuals possess privacy interests in personal medical information); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (recognizing a right to privacy from government intrusion into personal matters such as family planning). But see *American Fed'n of Gov't Employees, AFL-CIO v. Department of Hous. and Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing uncertainty as to whether the Constitution protects a right to privacy in personal information). While the circuits are split over whether the Constitution recognizes a right to privacy in personal information, the Fourth Circuit is among the majority of circuits which recognize such a right. See, e.g., *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

2. *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998). The district court case of the same name, *Condon v. Reno*, 972 F. Supp. 977 (D.S.C. 1997), will be referred to as the "District Court case" in this Note. The Fourth Circuit opinion will be referred to as "*Condon*."

3. 18 U.S.C. §§ 2721-2725 (1994 & Supp. IV 1998), amended by Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999).

4. *Reno v. Condon*, 120 S. Ct. 666 (2000)

5. *Id.* at 671 n.2 (noting that the issue was not brought up by the government in its brief to the court).

6. *Reno*, 120 S. Ct. at 672 (holding that the enactment of the DPPA was a valid exercise of congressional power under the authority of the Commerce Clause and that the application of the DPPA to the states did not constitute impermissible commandeering of the states in contravention of the Tenth Amendment).

This Note addresses the DPPA, South Carolina's challenge to the constitutionality of the DPPA, and the unresolved question of whether the United States Constitution's right to privacy should extend to information already turned over to the government. Part II explores the operation and purpose of the DPPA, the congressional authority to enact it, and South Carolina's recent challenge to the DPPA. Part II also discusses the federalism concerns expressed by South Carolina over the DPPA and the resolution of this issue by the United States Supreme Court in *Reno v. Condon*.<sup>7</sup> Part III examines the following Constitutional issues: (1) whether the United States Constitution guarantees Americans a right to privacy in personal information; (2) the United States Supreme Court's reactions when confronted with this issue; and (3) the balancing test used by the Fourth Circuit in personal information disclosure cases. The focus of this Note rests primarily in Part III's discussion of the privacy issues addressed but not definitively resolved in the course of the challenge to the DPPA. This Note intends to clarify and offer an opinion about what has become an issue that many courts have been reluctant to address because of the murky state of the law concerning the scope and protections of the right to privacy.

## II. BACKGROUND

### A. *The Driver's Privacy Protection Act*

One of the latest chapters in the ongoing tug-of-war between the public's right to know and individual privacy interests has been the controversial disclosure and sale of the personal information contained in Department of Motor Vehicles (DMV) records to third parties. In response to this controversial practice, Congress enacted the Driver's Privacy Protection Act of 1994 to restrict the disclosure of drivers' personal information by state DMVs.<sup>8</sup> The DPPA's original purpose was as a crime prevention measure,<sup>9</sup> as well as "to protect the personal privacy and safety of licensed drivers consistent with the legitimate needs of business and government"<sup>10</sup> Over time, however, what Congress perceived as legitimate business needs became more restrictive, and the amendment of the act in 1999 ultimately resulted in direct marketers being denied access to such information absent express consent of the individual driver.<sup>11</sup>

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7. *Id.*

8. 18 U.S.C. §§ 2721-2725 (1994 & Supp. IV 1998), amended by Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999).

9. See 140 CONG. REC. 7929 (1994) (statement of Rep. Goss); 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran).

10. S. Res. 1589, 103rd Cong. § 1(b), 139 CONG. REC. 26,266 (1993) (enacted).

11. Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999) (requiring states to have an opt-in policy whereby direct marketers cannot obtain an individual's personal information from the DMV without the individual's express consent).

The impetus for the DPPA's enactment was the 1989 murder of actress Rebecca Schaeffer, star of the television series "My Sister Sam."<sup>12</sup> A stalker shot and killed the actress in front of her apartment after obtaining her unlisted home address from the California DMV.<sup>13</sup> This brutal murder illuminated the threat to the public from the relatively easy public access to individuals' personal information in DMV records. Before the DPPA took effect, most states freely turned over DMV information to whomever requested it with few restrictions.<sup>14</sup> Because of such lax restrictions on the release of personal information from many states' DMVs, would-be criminals had easy access to home addresses and telephone numbers of potential victims.<sup>15</sup> Congress was keenly aware of a need to protect members of the public from this threat to their safety as several of the bill's sponsors gave specific examples of the kind of harm that had come to victims of those who obtained this information.<sup>16</sup> Public outrage over the Schaeffer murder and Congressional concern for public safety prompted the inclusion of the DPPA in the Violent Crime Control and Law Enforcement Act of 1994.<sup>17</sup>

The DPPA both mandates and restricts the disclosure of the personal information contained in DMV records.<sup>18</sup> Under the DPPA, states *must* make available drivers' information when the information is required to carry out certain federal statutes.<sup>19</sup> The states may also make information available at their discretion for public safety, judicial, insurance, anti-fraud, and motor vehicle related purposes.<sup>20</sup> Information may also be disseminated to direct marketers under subsection (b)(12), provided certain guidelines have been met.<sup>21</sup> Under the original 1994 version of the DPPA, the release of drivers'

12. See 137 CONG. REC. 27,327 (1993).

13. Ironically, the stalker obtained this information through a private investigator—a source that the DPPA still permits to have access to the personal information contained in DMV records. See 18 U.S.C. § 2721(b)(8); 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran).

14. 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran).

15. 140 CONG. REC. 7929 (1994) (statement of Rep. Goss).

16. 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran) (stating that a group of thieves in Iowa took the license plate numbers of expensive cars to the DMV to discover the home addresses of the cars' owners and burglarized the homes); 139 CONG. REC. 29,466 (1993) (statement of Sen. Boxer) (indicating that a man used the DMV to obtain the home addresses of several young women and sent them harassing letters); 139 CONG. REC. 29,462 (1993) (statement of Sen. Robb) (stating that a woman who visited a doctor who also performed abortions found black balloons outside her home after a group of anti-abortion activists had seen her car in the clinic's parking lot and had used her license plate information to obtain her home address from the DMV).

17. Violent Crime Control & Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994); see 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran).

18. 18 U.S.C. § 2721.

19. 18 U.S.C. § 2721(b). The enumerated statutes are the "Automobile Information Disclosure Act, the Motor Vehicle Information and Cost Saving Act, the National Traffic and Motor Vehicle Safety Act of 1966, the Anti-Car Theft Act of 1992, and the Clean Air Act." *Id.*

20. *Id.* (including disclosure to private investigators and towing companies among the acceptable recipients of drivers' personal information.).

21. § 2721 (b)(12).

personal information to direct marketers was subject to an "opt-out" requirement. DMVs were required to provide drivers with the opportunity to indicate their preference that personal information not be disclosed.<sup>22</sup> In late 1999, however, section (b)(12) was amended to require that states obtain the express consent of drivers to have their information disclosed to direct marketers—an "opt-in" requirement.<sup>23</sup>

The DPPA concerns itself solely with the personal information contained in DMV records. The DPPA has defined "personal information" as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information."<sup>24</sup> One argument by opponents of the DPPA, including the director of the South Carolina Press Association, is that reporters' investigations in the public interest, such as determining which school bus drivers have prior DUI convictions, would be hampered.<sup>25</sup> However, the information the DPPA protects does not include an individual's driving record.<sup>26</sup> Therefore, the press may still discover whether an individual school bus driver has a poor driving record. The DPPA simply limits press access to personal information such as the individual driver's address, social security number, or whether the driver has any disabilities. The bill's sponsors recognized the concerns expressed by members of the press and business community and drafted a piece of legislation which they believed struck a fair balance between the public's right to know and the individual's right to privacy.<sup>27</sup>

The DPPA directly conflicts with the extraordinarily permissive language of the related South Carolina statute.<sup>28</sup> South Carolina Code sections 56-3-510 to 540 permit the DMV to disclose drivers' personal information to any third party upon the completion of a form certifying that the recipient of the information will not use it for telephone solicitations.<sup>29</sup> Section 545 was added

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22. 18 U.S.C. § 2721-2725 (1994 & Supp. IV 1998).

23. Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999).

24. 18 U.S.C. § 2725(3).

25. Mark Pratt, *High Court Says License Data Private: Decision Sparks Debate Over Freedom of Information, States' Rights, Individual Protection*, AUGUSTA CHRON., Jan. 13, 2000, at A1, available in 2000 WL 5215520. It is important to note that South Carolina was joined by seven different press associations as plaintiffs against the United States. See *Reno v. Condon*, 120 S. Ct. 666 (2000); *Condon v. Reno*, 155 F.3d 453 (4<sup>th</sup> Cir 1998); *Condon v. Reno*, 972 F. Supp. 977 (D.S.C. 1997). It is unclear whether the press associations' motivation to join South Carolina in an action against the United States was fueled in part by this misconception.

26. See 18 U.S.C. § 2725(3); 139 CONG. REC. 29,468 (1993) (statement of Sen. Boxer) ("Nothing in this bill will stop the press, insurance companies, employers, or anyone else from obtaining information about an individual's driving record."). The DPPA does *not* limit access to driving records: it protects only *personal information* as defined above.

27. 139 CONG. REC. 27,327 (1993) (statement of Rep. Moran).

28. S.C. CODE ANN. §§ 56-3-510 to 545 (West Supp. 1999).

29. S.C. CODE ANN. §§ 56-3-510 to 540 (West Supp. 1999) (requiring only name, address, date, reason for request, and the promise of no telephone solicitations.).

in 1999 to prohibit the disclosure of photographs, social security numbers, and signatures.<sup>30</sup> South Carolina attempted to address the public safety issue through later amendments to different code sections imposing fines and light jail sentences for people who used the DMV information to commit crimes.<sup>31</sup> However, the penalties are so light that the deterrence of potential criminal activity is minimal.<sup>32</sup> Now that the Supreme Court has found the DPPA to be constitutional, South Carolina's policy for the release of personal information must conform to the DPPA.

By enacting the DPPA, Congress clearly demonstrated an awareness of the public's privacy fears. Congress also recognized that individuals may retain an expectation of privacy in the information they disclose to the government.<sup>33</sup> In amending the DPPA, Congress has clearly put the privacy interests of individuals before the commercial interests of direct marketers.

## B. Reno v. Condon

### 1. Background

South Carolina challenged the DPPA in Federal court, alleging that it violated the principles of federalism reflected in the Tenth Amendment to the

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30. S.C. CODE ANN. § 56-3-545 (West Supp. 1999).

31. S.C. CODE ANN. § 16-3-1710, §-1720 (West Supp. 1999).

32. *See id.*

33. *See* 139 CONG. REC. 29,469 (1993) (statement of Sen. Robb) ("This legislation is simply designed to close an important loophole that at this point restricts the privacy that I think most of our citizens believe they have."); 139 CONG. REC. 29,466 (1993) (statement of Sen. Boxer) (citing a survey reporting that eighty percent of those asked were not comfortable with the idea of another person procuring the type of information contained in DMV records). Senator Robb also stated:

The right to privacy, without which the [sic] Americans are not secure in their own homes, is seriously threatened. It is easy for anyone anywhere to access information as personal as your address and phone number, even if they are not listed in the telephone directory. Even your Social Security number is available, and the chief agent giving out this information is the very government that is supposed to protect its citizens.

139 Cong. Rec. 29,469 (1993). Congressional recognition that an individual may have a weighty expectation of privacy in his or her personal information contained in DMV records may be quite relevant in the courts' privacy analysis discussed *infra*, Part III. Of special importance is that in amending the DPPA to prohibit direct marketers from obtaining personal information without an individual's express consent, Congress may have made two assumptions. *See* Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999). First, an individual's privacy interest in his or her personal information may outweigh that of businesses. This may be relevant to the judicial balancing test discussed *infra*, Part III.B.2. Second, the inclusion of this amendment may indicate that Congress believes that the individual retains some control over the dissemination of his or her personal information once it has been disclosed to the government.

United States Constitution.<sup>34</sup> Relying heavily on *Printz v. United States*<sup>35</sup> and *New York v. United States*,<sup>36</sup> South Carolina argued that the DPPA effectively commandeered the states and compelled them to become “unwilling implementors of federal policy.”<sup>37</sup>

In *Reno*, the Supreme Court undertook a two part analysis to determine whether the DPPA was valid under the United States Constitution.<sup>38</sup> First, the Court determined that the DPPA regulated a thing in interstate commerce, justifying Congress’ reliance on the authority granted by the Commerce Clause.<sup>39</sup> Second, the Court found that the DPPA did not violate the Tenth Amendment’s federalism principles.<sup>40</sup>

## 2. Commerce Clause

The United States Supreme Court found in *Reno* that the DPPA was a valid exercise of congressional authority under the Commerce Clause.<sup>41</sup> South Carolina was one of approximately thirty-four states in the business of selling DMV information at the time Congress enacted the DPPA in 1994.<sup>42</sup> In the past few years, South Carolina has made less than \$50,000 from these sales.<sup>43</sup> Before public outrage stymied the deal, South Carolina had entered into a \$5,000 contract with Image Data, Inc. of New Hampshire to sell the DMV photographs of roughly 3.5 million individuals for use by the company in developing an anti-fraud device.<sup>44</sup> The Court determined that the personal information contained in DMV records is a “thing in interstate commerce” because Congress found that it has been sold as a commodity to direct marketers, insurers, and others who regularly participate in interstate commerce and used the information in furtherance of this commercial activity.<sup>45</sup> The Court then went on to hold that the DPPA did not violate the Tenth Amendment.

34. *Reno*, 120 S. Ct. at 671. Charlie Condon said that he was not fighting over privacy but for states’ rights. Pratt, *supra* note 25, at A1.

35. 521 U.S. 898 (1997).

36. 505 U.S. 144 (1992).

37. *Reno*, 120 S. Ct. at 671-72 (citing Brief for Respondents at 11).

38. *Reno*, 120 S. Ct. at 671.

39. *Id.*

40. *Id.* at 671-72.

41. *Id.* at 671; see U.S. CONST., art. I, § 8, cl. 3; see also, 139 CONG. REC. 29,468 (1993) (statement of Sen. Boxer) (stating that the dissemination of personal information impacts interstate commerce).

42. 139 CONG. REC. 29,466 (1993) (statement of Sen. Boxer); see also Condon v. Reno, 155 F.3d 453 (4th Cir. 1998).

43. Robert S. Greenberger, *Privacy Battle Over Databases at High Court*, WALL ST. J., Nov. 10, 1999 at B1, available in 1999 WL-WSJ 24921495. New York made \$17 million and Wisconsin made \$8 million in one year off these sales. Jan Crawford Greenburg, *Court Upholds Drivers’ Privacy: Justices Back Congress in Restricting States’ Sale of Personal Data*, CHI. TRIB., January 13, 2000, at 9, available in 2000 WL 3626098.

44. Pratt, *supra* note 25, at .

45. *Reno*, 120 S. Ct. at 671.

### 3. Federalism Concerns

The United States Supreme Court appears to have changed course in upholding the constitutionality of the DPPA in *Reno v. Condon* amidst charges that the DPPA violated federalism principles.<sup>46</sup> In recent years, the Court has consistently found in favor of the states when federalism concerns arose.<sup>47</sup> The Court may have somewhat limited the scope of this trend in *Reno v. Condon* by rejecting South Carolina's contention that the DPPA violated the Tenth Amendment.<sup>48</sup>

Two lines of cases concerning federalism have developed over recent years. The holdings of *New York v. United States*<sup>49</sup> and *Printz v. United States*<sup>50</sup> revolve around the authority of the government to instruct the states to implement federal regulations. The *Garcia* line of cases found that regulation of the states is acceptable in the federalist system where the law is one of general applicability, meaning that it is only incidentally applicable to the states.<sup>51</sup> The Fourth Circuit Court of Appeals thought *Reno* fell within the *New York* and *Printz* line of cases and endorsed the Supreme Court's recent trend of curtailing the reach of federal regulation.<sup>52</sup>

The Fourth Circuit, in determining that the DPPA was an example of the federal government impermissibly commandeering or imposing unconstitutional burdens on the states, no doubt believed it was following the same approach the Supreme Court had typically taken in recent years when federalism questions arose.<sup>53</sup> However, the Supreme Court deviated from this trend in *Reno* and determined that Congress was not overreaching its regulatory authority because the DPPA does not force states to enact regulations or carry out federal programs.<sup>54</sup> Relying on *South Carolina v. Baker*,<sup>55</sup> the Court explained that "the DPPA does not require the States in their sovereign capacity to regulate their own citizens," but merely requires states to refrain from making inappropriate disclosures and "regulates states as the owners of

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46. See *Foot on Brake: the Supreme Court and Federalism*, THE ECONOMIST, Jan. 22, 2000, at 31 [hereinafter *Foot on Brake*].

47. *Id.*; see, e.g., *Printz v. United States*, 521 U.S. 898; *New York v. United States*, 505 U.S. 144.

48. See *Reno*, 120 S. Ct. at 672.

49. 505 U.S. 144 (1992).

50. 521 U.S. 898 (1997).

51. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

52. See *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998); *Foot on Brake: the Supreme Court and Federalism*, THE ECONOMIST, Jan. 22, 2000, at 31.

53. It appears to some commentators that the Supreme Court has gone out of its way to hear cases concerning federalism issues. *Id.*

54. *Reno*, 120 S. Ct. at 672.

55. *South Carolina v. Baker*, 485 U.S. 505 (1988). The Court in *Reno* summed up *Baker*'s holding: where a federal law merely "'regulate[d] state activities' rather than 'seeking] to control or influence the manner in which states regulate private parties,'" states have not been impermissibly commandeered. *Reno*, 120 S. Ct. at 672 (quoting *Baker*, 485 U.S. at 514-15).



databases.”<sup>56</sup> In so finding, the Court determined that the DPPA is generally applicable within the meaning of *Garcia*.<sup>57</sup>

In light of the Court’s analysis in *Reno*, in order to be impermissibly commandeered the states or their officials must be forced to assist in the implementation of a federal regulatory objective. Where states must refrain from acting, as was the objective of the DPPA, the states are not unconstitutionally commandeered even though Congress may be attempting to control their behavior. The DPPA required no affirmative regulatory action by the states and therefore did not violate the Tenth Amendment.<sup>58</sup> As Justice Scalia noted in oral arguments, “[the states] haven’t been commandeered at all. . . . All you have to do is sit on your hands. What’s so hard about that?”<sup>59</sup>

In addition to prohibiting direct marketers from having access to individuals’ personal information absent express consent, the 1999 amendments to the DPPA also tied compliance with the DPPA to federal highway funding, thereby buttressing the DPPA against attacks on Congress’ authority to enact the DPPA.<sup>60</sup> The addition of this amendment prior to oral arguments made the federalism debate surrounding *Reno v. Condon* a “little academic” in the eyes of Justice O’Connor.<sup>61</sup> Congress’ authority to enact the DPPA was no longer solely tied to the Commerce Clause and thereby restricted by the principles of federalism. Instead, Congress adopted an incentive-based approach whereby the availability of federal highway funding was tied to states’ compliance with the DPPA.

With the Court’s unanimous decision, the constitutionality of the DPPA has now been definitively resolved. The enactment of the DPPA was a valid exercise of congressional power under the Commerce Clause and did not violate the principles of federalism underlying our system of government. The question remains, however, whether an individual retains a right to privacy under the United States Constitution regarding the personal information contained in DMV records.

#### IV. THE SCOPE OF THE RIGHT TO PRIVACY: THE ISSUE LEFT UNRESOLVED

##### A. *The Evolution of the Right to Privacy*

56. *Reno*, 120 S. Ct. at 672. The states, as owners of databases, were not acting for a regulatory purpose, but for a proprietary purpose. Accordingly, the DPPA’s control of this type of state conduct did not involve the states in implementing a regulatory scheme.

57. *Id.*

58. *Id.*

59. Steve Lash, *Supreme Court Debates Driver’s License Issue: Federal Law Bans State Sales of Personal Data*, HOUSTON CHRONICLE, Nov. 11, 1999, at 3, available in 1999 WL 24264423 (quoting Justice Scalia).

60. Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999).

61. Jan Crawford Greenburg, *supra* note 42, at 9 (quoting Justice O’Connor). Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999). This amendment assured states’ compliance with the DPPA despite the Fourth Circuit’s ruling and the possibility that the Supreme Court might have upheld its determination that the DPPA was unconstitutional.

The United States Constitution provides citizens with many express protections from government wrongs. The Supreme Court has consistently found additional protections implicit in the Constitution.<sup>62</sup> One such protection is the 'right to privacy.'<sup>63</sup>

Laws are merely codified social norms and concepts of individual privacy have long been incorporated into social norms.<sup>64</sup> American jurisprudence recognizes that private matters should be protected against intrusion by the government.<sup>65</sup> The United States Supreme Court first recognized a constitutional 'right to privacy' in certain types of private conduct in *Griswold v. Connecticut*.<sup>66</sup> The Court has since wrestled with defining the scope of this right.

The Supreme Court has distinguished two types of privacy interests an individual may possess: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."<sup>67</sup> The type of privacy protection recognized in *Griswold* falls under the latter category, while the information contained in DMV records falls under the former.

## *B. Information Privacy: The Fourth Circuit's Approach*

### *1. Reasonable Expectations of Privacy*

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62. U.S. CONST. amend. IX; see *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing that the constitution affords citizens a right to privacy in certain matters). The *Griswold* Court recognized that "zones of privacy" exist within the penumbras of the Bill of Rights. *Griswold*, 381 U.S. at 484. Justice Goldberg, in his concurring opinion, expounded upon one of the majority's justifications for the existence of the right to privacy arguing that the Ninth Amendment was added to the Constitution because the framers did not intend for the Bill of Rights to be an exhaustive list of rights protected under the Constitution. *Griswold*, 381 U.S. at 487-491 (Goldberg, J., concurring). The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. Amend. IX. Justice Goldberg emphasized that:

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

*Griswold*, 381 U.S. at 491.

63. See *Griswold*, 381 U.S. at 484-85. *Whalen v. Roe*, 429 U.S. 589 (1977); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

64. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193-220 (1890); RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 39 (1999).

65. See *Griswold*, 381 U.S. at 484-85.

66. *Id.*

67. *Whalen*, 429 U.S. at 599-600 (footnotes omitted).

A right to privacy in personal information has been recognized in the Fourth Circuit.<sup>68</sup> However, an individual's reasonable expectation of confidentiality constrains this right.<sup>69</sup> In *Condon*, the Fourth Circuit asserted that neither it nor the Supreme Court "has ever recognized a constitutional right to privacy with respect to" the type of information contained in DMV records.<sup>70</sup> Citing a string of Supreme Court cases, the Fourth Circuit rebutted the contention that drivers' personal information was protected under the Fourteenth Amendment's right to privacy and indicated that "the Fourteenth Amendment does not override all principles of federalism."<sup>71</sup> This reference clearly suggests that the court firmly couched its privacy decision in its federalism analysis. Because the Supreme Court's decision in *Reno* did not address the right to privacy issue raised in the lower courts, the Fourth Circuit's privacy analysis must be reevaluated.

The Fourth Circuit's decision in *Walls v. City of Petersburg* explicitly recognized the existence of a constitutional 'right to privacy' in personal information. The court indicated that "a right to privacy protects only information with respect to which the individual has a reasonable expectation of privacy."<sup>72</sup> The court further found that an individual may not have a reasonable expectation of privacy where the information the government seeks is already a matter of public record.<sup>73</sup> In *Condon*, the Fourth Circuit believed that the personal information contained in DMV records was a matter of public record as discussed in *Walls*.<sup>74</sup> Because individuals have no reasonable expectation of privacy in the information, they would have no right to privacy in it.<sup>75</sup>

#### a. Public Record

The information contained in motor vehicle records is detailed. In South Carolina, it includes a name, address, date and place of birth, telephone number, social security number, race, height, weight, hair and eye color, whether an individual has any disabilities or vision problems, and a

68. See *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990).

69. See *id.*

70. *Condon v. Reno*, 155 F.3d 453, 456, 464 (4th Cir. 1998) (indicating that the information it was referring to included name, address, and telephone number).

71. *Condon*, 155 F.3d at 464 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991)).

72. *Id.* at 193.

73. *Id.* *Walls* involved a claim by a government employee that divulging certain personal information to the government-employer in a background questionnaire violated her right to privacy. *Id.* at 189. The questionnaire required her to "[l]ist all marriages you have had and the present status thereof: If divorced, annulled or separated, give details of date, offending party as decreed by law, and the reason therefore [sic] on a separate sheet of paper. . . . List every child born to you." *Id.* at 190. The court said that "any details that are not part of the public record concerning [these items]. . . are private and thus protected." *Id.* at 193.

74. *Condon*, 155 F.3d at 465.

75. *Id.*

photograph.<sup>76</sup> This list is not only more extensive information than the information determined to be part of the public record in *Walls*,<sup>77</sup> but it is all *linked*. This linkage, plus the inclusion of information that is generally not a matter of public record, such as a list of disabilities and a social security number, makes the information possessed by the DMV different from the public record information in *Walls*. This linkage makes the personal information contained in DMV record unique and especially valuable to direct marketers. It also makes the dissemination of the information particularly invasive to the individual because the privacy interest an individual possesses in the whole package of information contained in the DMV records may be greater than the privacy interests in each of the individual pieces of information.<sup>78</sup>

*b. Expectations of Privacy Relating to the Existence of a Right to Privacy in Information*

In *Condon*, the Fourth Circuit cited the Supreme Court's statement that "pervasive schemes of regulation, like vehicle licensing, must 'necessarily lead to reduced expectations of privacy'"<sup>79</sup> as support for the proposition that "individuals do not have a reasonable expectation of privacy" regarding the

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76. S.C. CODE ANN. §§ 56-1-80, -90, -130, -170 (Law. Co-op. 1991 & West Supp. 1999); see also 18 U.S.C. §2725(3) (1994 & Supp. IV 1998) as amended by Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999) (defining "personal information" as including some of the above items).

77. See *supra* note 75.

78. While one piece of information may be considered public record and not subject to a reasonable expectation of privacy, when several of these pieces of information are linked together, the potential to intrude more deeply into a person's personal sphere of privacy increases. The privacy interest in the whole may be greater than the sum of its parts because while not much may be gleaned about an individual through separate bits of information, when a third party possesses a whole packet of information about an individual, a clearer picture of that person emerges. That more detailed picture of an individual derived from the linked pieces of information may cause the individual greater concern and create a greater privacy interest in the package of information. For example, where a third party simply knows an individual's telephone number the most he can do is to call the individual. However, when that third party knows many pieces of information all tied to that same individual, such as name, address, date of birth, and social security number, the third party may be able to access the individual's bank records, obtain official documents or credit cards in the individual's name, or worse. If, for example, a photograph were included in the packet of information a different scenario may arise. An individual may have no expectation of privacy in his or her appearance, but if a potential stalker wished to limit his activities to attractive young women, he would merely have to find the photograph of an attractive young woman and look to the other information linked to the photograph, such as the potential victim's name, address, and telephone number in order to locate and harass her. Therefore, the privacy interest in linked information clearly can be greater than the sum of the individual pieces of information.

79. *Condon*, 155 F.3d at 465 (quoting *California v. Carney*, 471 U.S. 386, 392 (1985)); see also *New York v. Class*, 475 U.S. 106, 113 (1986) (holding that the reasonable expectation of privacy is diminished as to one's VIN number).

information found in motor vehicle records.<sup>80</sup> Circumstances that reduce an expectation of privacy, however, do not necessarily eliminate the right to privacy. The Fourth Circuit does not appear to have made this distinction in either *Walls* or *Condon*. In *California v. Carney*,<sup>81</sup> the owner of a motor home was found to have reduced expectations of privacy in his motor home because vehicles are subject to more regulation than conventional homes.<sup>82</sup> However, the individual in *Carney* did not lose his right to privacy in the motor home; instead he found it reduced because of the nature of the thing in which he had a privacy interest.<sup>83</sup> *Carney* reinforces the idea that such 'pervasive schemes of regulation' do not necessarily lead to the elimination of any existing constitutional right to privacy.<sup>84</sup>

In conducting a privacy analysis, one must also take into account the reasonable expectation of privacy an individual has in the information - an expectation which may be reduced by the nature of the information in the records.<sup>85</sup> It does not appear that the nature of the personal information contained in DMV records would cause this expectation to be reduced. On the contrary, because of the linked nature of the records, the privacy expectation in the personal information record as a whole, once in the hands of the government, may be *greater* than the expectations of privacy in each individual piece of information. Therefore, the Fourth Circuit's insistence that there is *no* right to privacy in an individual's personal DMV record information may be flawed.

## 2. *Balancing Test*

The right to privacy is not an absolute right, however, as the Fourth Circuit pointed out in *Walls v. City of Petersburg*.<sup>86</sup> It may be overcome by a showing of a compelling government interest.<sup>87</sup> In *Walls*, the Fourth Circuit employed a balancing test to determine whether the requirement of disclosure of personal information to the government violated the individual's right to privacy.<sup>88</sup> In the typical case, the balancing test requires the court to weigh the individual's interest in keeping the information from being disclosed to the government against the government's interest in obtaining the information.<sup>89</sup> Where the case involves disclosure *by* the government, it would appear that the courts would

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80. *Condon*, 155 F.3d at 464-65.

81. 471 U.S. 386 (1985).

82. *Carney*, 471 U.S. at 392.

83. *Id.*

84. *Id.*

85. *Id.*

86. 895 F.2d 188, 192 (4th Cir. 1990).

87. *Id.*

88. *Id.* See *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980).

89. *Walls*, 895 F.2d at 192.

use the same balancing test. Once a right to privacy has been established, the government must demonstrate "that a compelling governmental interest in disclosure outweighs the individual's privacy interest."<sup>90</sup> Several factors affect this analysis, including

the type of . . . [information] requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, . . . the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.<sup>91</sup>

In the case of the DPPA, the individual's interest in the information must be greater than that of the government in disseminating it. Congress, in enacting the DPPA Amendments of 1999, placed the individual's privacy interest in his or her personal information already disclosed to the government ahead of the government's interest in selling that information to businesses.<sup>92</sup> Perhaps courts will do the same in the future.

### 3. *Possibility of Disclosure*

The judiciary is keenly aware of the possible dangers associated with the further public disclosure of information gathered by the government and stored in computer databases.<sup>93</sup> The *Walls* court's concern for the possibility of abuse of the information *Walls* disclosed with the growth of new information technologies is evident:

Although some of this information [contained in computer databases] can be useful and even necessary to maintain order and provide communication and convenience in a complex society, we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.<sup>94</sup>

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90. *Id.* In *Walls*, the court determined that the government possessed a sufficiently compelling reason to require disclosure of certain personal information because the nature of *Walls*' government job was such that the government interests outweighed her personal privacy interests. *Id.* at 193-194.

91. *Westinghouse*, 638 F.2d at 578.

92. Act of Oct. 9, 1999, Pub. L. No. 106-69, § 350, 113 Stat. 986, 1025-26 (1999).

93. *See Whalen v. Roe*, 429 U.S. 589 (1977); *Westinghouse*, 638 F.2d at 579-580; *Walls*, 895 F.2d at 194-195.

94. *Walls*, 895 F.2d at 194-95.

In *Walls*, the information divulged to the government was kept in a locked file cabinet.<sup>95</sup> The *Walls* court noted, importantly, that “if this type of information had been more widely distributed, our conclusions might have been different.”<sup>96</sup> This dicta reflects an important concern in our society that has been expressed on several occasions by both the judiciary and by Congress.<sup>97</sup>

One of the key factors the Fourth Circuit considered in its *Walls* privacy analysis was the possibility of further unwarranted disclosure of the individual’s personal information.<sup>98</sup> Since the information to be relinquished to the government would be kept in a locked file cabinet and the risk of disclosure was relatively remote, the court determined that *Walls*’s privacy expectations in the information were reduced.<sup>99</sup> However, this analysis is flawed. It is not that *Walls*’s privacy interest in the information was reduced, but rather that the government’s intrusion into that interest was less. Therefore, the possibility of future disclosure should enter the analysis when the court balances the competing interests of the individual and the government, but should not be a factor in considering the nature or extent of the individual’s privacy interest.

#### 4. *Right to Informational Privacy as Applied to DPPA*

In *Reno v. Condon*, the Supreme Court was not asked to address the issue of whether an individual’s constitutionally protected right to privacy extends to situations in which the government discloses information to third parties.<sup>100</sup>

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95. *Id.* at 194.

96. *Id.*

97. See 18 U.S.C. § 2721-2725; *Whalen v. Roe*, 429 U.S. 589 (1977); *Watson v. Lowcountry Red Cross*, 974 F.2d 482 (4th Cir. 1992); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990). The Third Circuit emphasized this concern in *Westinghouse*:

Proliferation in the collection, recording and dissemination of individualized information has made the public, Congress and the judiciary increasingly alert to the threat such activity can pose to one of the most fundamental and cherished rights of American citizenship, falling within the right characterized by Justice Brandeis as ‘the right to be let alone.’ Much of the concern has been with governmental accumulation of data and the ability of government officials to put information technology to uses detrimental to individual privacy, which have been facilitated by the spread of data banks and by the increasing storage in computers of sensitive information relating to the personal lives and activities of private citizens.

*Westinghouse*, 638 F.2d at 576 (internal citations omitted). This discussion seems squarely on point with the concerns of the DPPA.

98. *Walls*, 895 F.2d at 194.

99. *Id.*

100. The United States did not raise this issue to the Supreme Court in *Reno*, and therefore it was not addressed by the Court. *Reno*, 120 S. Ct. at 671 n.2. “In the lower courts, the United States also asserted that the DPPA was lawfully enacted pursuant to Congress’ power under § 5 of the Fourteenth Amendment . . . . The District Court and Court of Appeals rejected that argument . . . . The United States’ petition for certiorari and briefs to this Court do not address

In light of recent opinions from the Supreme Court and the Fourth Circuit, this right may indeed exist.<sup>101</sup> However, these recent cases only address the disclosure of personal information to the government.

The disclosure of individuals' information by the government presents a different situation than the disclosure of information to the government. An important distinction between the two lies in the purpose for which the information is to be used. Implicit in the government's request of information is the presumption that the information is being gathered in furtherance of a legitimate governmental function. This factor is implicitly included in the balancing analysis the courts employ in disclosure cases. Members of society must relinquish certain aspects of our identities to the government to help it govern more effectively. However, when this information is released by the government for purposes completely unrelated to legitimate public concerns, the policy perspective changes. The sacrifice of personal privacy is not necessary for the common good in such contexts.

There is no absolute privacy right with respect to personal information that would categorically prevent the government from obtaining personal information. It does appear, however, that an individual's privacy interests in the information continue even after it has been disclosed to the government.<sup>102</sup> The government's actions in disclosing the information should be subject to the same balancing test that is applied with respect to disclosures of personal information to the government. Therefore, the governmental interest in disseminating the information may not be as compelling as it may have been when the government collected the information for a legitimate regulatory purpose.

For example, the government's compelling interest in regulating and licensing drivers provides adequate justification to overcome any right to privacy objection an individual may lodge against the government's collection of his personal information. The compelling governmental purpose which once justified its collection ceases to exist when the government attempts to disseminate this same information to third parties.<sup>103</sup> The government would have to show a different compelling interest to justify further disclosure. Because of its linked nature, an individual may also possess a greater privacy interest in the personal information to be disseminated by the DMV. The combination of a heightened privacy interest and a reduced governmental interest may lead to a different outcome upon application of the balancing test.

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the § 5 issue and, at oral argument, the Solicitor General expressly disavowed any reliance on it." *Id.*

101. See *Whalen*, 589 U.S. at 599-600; *Walls*, 895 F.2d at 192.

102. This continuation of privacy interests seems to be implicit in the judiciary's concern with the possibility of further disclosure as an element of its balancing test. See *Whalen*, 429 U.S. at 600-06; *Westinghouse*, 638 F.2d at 579-580; *Walls*, 895 F.2d at 194-95.

103. The Supreme Court noted in *Whalen* that "[t]he right to collect and use such [medical] data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." 429 U.S. at 605.



The nature of the government's intrusion would necessarily be greater where the government discloses an individual's personal information to the public. Disclosure by the government may result in widespread, potentially infinite dissemination of the individual's information, while disclosure to the government would generally have a less intrusive result because of the limited scope of the disclosure. Following the privacy fears expressed in *Walls*, *Westinghouse* and *Whalen*, a court would appear to be much less inclined to find that the individual's privacy interests were being adequately protected by the government in a situation involving unchecked disclosure of an individual's information by the government. Thus, the DPPA properly prevents such disclosures, but the judiciary should recognize and address the need for protection from the invasion of privacy which government disclosure prevents.

#### IV. CONCLUSION

The DPPA addresses an issue which has increasingly become a focus of the public's attention—the erosion of personal privacy. According to *Reno v. Condon*, Congress did not run afoul of the principles of federalism established by the Tenth Amendment when it enacted the DPPA. However, whether the subject matter the DPPA seeks to protect—personal information—is also implicitly protected by the United States Constitution has been left unresolved. As the intrusions into personal privacy increase with the expansion of the information age, the time is right for the Court to definitively address the issue of whether Americans possess a Constitutional right to be free from unreasonable intrusions into their personal information. The Court should address this issue now, before the sphere of privacy surrounding the individual is whittled away to nothing.

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